

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE  
AT NASHVILLE

Assigned on Briefs August 11, 2004

**STATE OF TENNESSEE v. JIMMY L. MCGLOTHEN**

**Direct Appeal from the Circuit Court for Sequatchie County  
No. 4260     Buddy D. Perry, Judge**

---

**No. M2004-00163-CCA-R3-CD - Filed September 23, 2004**

---

The appellant, Jimmy L. McGlothen, pled guilty in the Sequatchie County Circuit Court to one count of aggravated sexual exploitation of a minor. He received a sentence of six years incarceration in the Tennessee Department of Correction. The trial court denied the appellant any form of alternative sentencing, and the appellant appeals that denial. Upon our review of the record and the parties' briefs, we affirm the judgment of the trial court.

**Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Circuit Court is Affirmed.**

NORMA MCGEE OGLE, J., delivered the opinion of the court, in which DAVID H. WELLES and ROBERT W. WEDEMEYER, JJ., joined.

B. Jeffery Harmon (at trial and on appeal) and Robert Morgan (at trial), Jasper, Tennessee, for the appellant, Jimmy L. McGlothen.

Paul G. Summers, Attorney General and Reporter; Elizabeth T. Ryan, Senior Counsel; J. Michael Taylor, District Attorney General; and Steven Strain, Assistant District Attorney General, for the appellee, State of Tennessee.

**OPINION**

**I. Factual Background**

On April 2, 2003, the appellant entered a plea of guilt to aggravated sexual exploitation of a minor, a Class C felony. As the factual basis for the plea, the State recounted the following:

[I]f [the appellant's case] came to trial the State would be calling Keith Herron, Jackie Shell, Randy Phillips and other officers. They would testify that in March of 2002, they obtained information from two minor children. These children had been living at the residence with Mr. McGlothen. That they – that the children advised the

officers or advised DCS people in Hamilton County that there had been photographs made of the children. That photographs would be suggestive of sexual activity, and that based on that the officers obtained a search warrant, that they executed a search at the residence; that they found items consistent with the production of material which would be illegal under that statute. Basically material involving children engaging in sexual activity.

The State noted that as part of the plea agreement, the State would not pursue additional charges against the appellant. Further, the plea agreement provided for an agreed sentence of six years, with the manner of service to be determined by the trial court.

At the sentencing hearing, the trial court determined that “the circumstances of this case [are] sufficient to overcome the presumption of eligibility for alternative sentencing.” Specifically, the trial court outlined the facts supporting its decision:

We’ve got three victims ages 13, 12 and 9. All three of the victims were relatives of the defendant and he, in fact, sought temporary custody of those children, ostensibly would be to provide protection and care for the children. The Court expected if they gave temporary custody that the children were going to be put in a safe environment and instead they were put in an environment where they were subject to the events that occurred in this case. I think the violation of that . . . private trust . . . is a sufficient circumstance in and of itself to draw the conclusion that the Court should find that it outweighs the presumption of eligibility for alternative sentencing and that the defendant should be required to serve the sentence.

On appeal, the appellant challenges this ruling.

## **II. Analysis**

Appellate review of the length, range or manner of service of a sentence is de novo. See Tenn. Code Ann. § 40-35-401(d) (2003). In conducting its de novo review, this court considers the following factors: (1) the evidence, if any, received at the trial and the sentencing hearing; (2) the presentence report; (3) the principles of sentencing and arguments as to sentencing alternatives; (4) the nature and characteristics of the criminal conduct involved; (5) evidence and information offered by the parties on enhancement and mitigating factors; (6) any statement by the defendant in his own behalf; and (7) the potential for rehabilitation or treatment. See Tenn. Code Ann. §§ 40-35-102, -103, -210 (2003); see also State v. Ashby, 823 S.W.2d 166, 168 (Tenn. 1991). The burden is on the appellant to demonstrate the impropriety of his sentence. See Tenn. Code Ann. § 40-35-401, Sentencing Commission Comments. Moreover, if the record reveals that the trial court adequately considered sentencing principles and all relevant facts and circumstances, this court will accord the

trial court's determinations a presumption of correctness. Id. at (d); Ashby, 823 S.W.2d at 169. There is no affirmative showing in the record before us that the trial court correctly considered the sentencing principles; accordingly, we will conduct our review purely de novo.

We recognize that an appellant is eligible for alternative sentencing if the sentence actually imposed is eight years or less. See Tenn. Code Ann. § 40-35-303(a) (2003). Moreover, an appellant who is an especially mitigated or standard offender convicted of a Class C, D, or E felony is presumed to be a favorable candidate for alternative sentencing. See Tenn. Code Ann. § 40-35-102(6). In the instant case, the appellant is a standard Range I offender convicted of a Class C felony and sentenced to six years incarceration; therefore, he is presumed to be a favorable candidate for alternative sentencing. However, this presumption may be rebutted by "evidence to the contrary." State v. Zeolia, 928 S.W.2d 457, 461 (Tenn. Crim. App. 1996). The following sentencing considerations, set forth in Tennessee Code Annotated section 40-35-103(1), may constitute "evidence to the contrary":

(A) Confinement is necessary to protect society by restraining a defendant who has a long history of criminal conduct;

(B) Confinement is necessary to avoid depreciating the seriousness of the offense or confinement is particularly suited to provide an effective deterrence to others likely to commit similar offenses; or

(C) Measures less restrictive than confinement have frequently or recently been applied unsuccessfully to the defendant.

Zeolia, 928 S.W.2d at 461.

In the instant case, the trial court determined that the circumstances of the offense were sufficiently serious to warrant a denial of alternative sentencing. This court has previously stated that the nature and circumstances underlying the criminal conduct may alone give rise to the denial of probation. See Tenn. Code Ann. § 40-35-210(b)(4); State v. Fletcher, 805 S.W.2d 785, 789 (Tenn. Crim. App. 1991). In denying an alternative sentence to avoid depreciating the seriousness of an offense, this court should determine if the criminal act is especially violent, horrifying, shocking, reprehensible, offensive, or otherwise of an excessive or exaggerated degree. See Zeolia, 928 S.W.2d at 462.

The record in the instant case reveals that the appellant petitioned for custody of his three minor grandnieces, the victims, in December 1999. At the time the victims were placed with the appellant and his wife, they had already been shuffled from the custody of their mother, the Department of Children's Services, and their grandmother, the appellant's sister. Interviews with the victims at the Children's Advocacy Center revealed that during their stay with the appellant, he installed a video camera in the bathroom, aimed the camera at the bathtub, and "watch[ed] them take a bath, on TV." Additionally, the appellant showed the victims sexually graphic pictures, including

pictures with the victims' heads "on another female's nude body." The appellant often attempted to involve the victims in sexual activities. For example, he took them to a nude beach and encouraged them to disrobe, he attempted to persuade the victims to engage in sexual acts with him, and he attempted to convince the victims to perform sexual acts on their friends. The victim impact statement by the victims' guardian ad litem reflected that the victims were attending therapy sessions and "will be for the foreseeable future." Furthermore, the oldest victim opined that the appellant "should be put away for a real long time." Additionally, the appellant was aware that the victims had been sexually abused before they came to live with him.

We conclude that the foregoing facts amply support the trial court's determination that the circumstances of the offense, including the appellant's abuse of a position of trust, overcome the presumption in favor of alternative sentencing. See State v. Boston, 938 S.W.2d 435, 438 (Tenn. Crim. App. 1996); State v. Richard L. Thompson, No. M2000-01429-CCA-R3-CD, 2001 WL 1028822, at \*\*7-8 (Tenn. Crim. App. at Nashville, Sept. 7, 2001); State v. Harold Dewayne Jarrett, No. 02C01-9808-CC-00251, 1999 WL 222439, at \*3 (Tenn. Crim. App. at Jackson, Apr. 9, 1999).

### **III. Conclusion**

Finding no error, we affirm the judgment of the trial court.

---

NORMA McGEE OGLE, JUDGE